

Leocadio (Migration) [2019] AATA 4658 (15 October 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Rachelle Emmanuelle Leocadio
CASE NUMBER:	1722070
HOME AFFAIRS REFERENCE(S):	BCC2016/460695
MEMBER:	Adrienne Millbank
DATE:	15 October 2019
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211 of Schedule 2 to the Regulations • cl.820.221 of Schedule 2 to the Regulations • r.2.03A

Statement made on 15 October 2019 at 4:15pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine de facto relationship – registered relationship under Queensland legislation – financial, household and social aspects of relationship – nature of commitment – relationship genuine and continuing – decision under review remitted

1.

2. **LEGISLATION**

3. *Migration Act 1958 (Cth), ss 5F, 5CB(2), 65*

Migration Regulations 1994 (Cth), rr 1.09A(3), 2.03A, Schedule 2, cl 820.211(2), 802.221

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a Delegate of the Minister for Immigration and Border Protection on 29 August 2017 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant applied for the visa on 31 January 2016 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.

Background

6. The applicant is a citizen of the Philippines, born in the Philippines in 1984. She is 35 years old at the time of decision. She first arrived in Australia in 1999 on a Tourist visa, and returned in 2003 on a Student visa. She was granted a Tourist-stream Visitor visa, onshore, in August 2015. The sponsor is an Australian citizen, born in Australia in 1983 of French/Indonesian parentage. He is 36 years old at the time of decision.
7. The parties met in high school in Papua New Guinea, where their parents worked. The sponsor came to Australia for tertiary studies in 2002, and the applicant followed a year later. They claimed at the time of application to have been in a relationship since 2003, and that they moved in together in 2010.
8. The Delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) and therefore cl.820.211. Insufficient evidence had been provided to satisfy the Delegate that the applicant was the spouse or de facto partner of the sponsor, as defined under s.5F and s.5CB of the Act.
9. The Delegate noted in the decision record that the parties claimed to have been in a committed de facto relationship since 12 September 2010; however the evidence of relationship they provided overall was limited: it was insufficient to demonstrate that they had combined their affairs significantly; and it was insufficient to demonstrate that they were committed to each other on a long-term basis.
10. On 30 May 2019 the Tribunal requested the applicant to provide further information in support of her claim to be in a de facto relationship with her sponsor. On 13 and 14 June 2019 further documents were provided to the Tribunal by the applicant, including written statements by the applicant and the sponsor, and a large number of photographs of the parties together and with friends and family. Further documents, evidence of the parties' financial arrangements, were received by the Tribunal on 1 October 2019, after the hearing.
11. The parties did not engage the services of a migration agent.
12. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in the present case is whether the applicant is in a genuine spousal or de facto relationship with the sponsor.

Whether the parties are in a spouse or de facto relationship

14. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

Are the parties in a de facto relationship?

15. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
16. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision. Each of the specific matters contained in r.1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Financial aspects of the relationship

17. The parties confirmed at hearing that they have no significant assets in common, or joint liabilities beyond a joint tenancy agreement, or legal obligations owed to the other. The sponsor described how they have lived since moving in together in 2010 in an apartment owned by his brother. The parties advised that they have remained in the apartment because they get a good rental deal, the apartment is conveniently located near to the sponsor's family and to friends, and it has suited their lifestyle.
18. In response to questions from the Tribunal, the parties described how they organise their finances as a couple. They stated that they each maintain their own personal bank account, into which their incomes are paid, and which they use for personal-choice expenses. They both pool money into two joint bank accounts: one for savings, for things like travel and other significant joint expenditure; and one for joint household expenses. Statements of transactions from February 2019 to September 2019 from the parties' bank accounts were provided, confirming these arrangements.
19. The applicant described at hearing how the sponsor supported her financially when, after she completed her tertiary studies and obtained her degree, she decided to pursue a diploma-level course in fashion design and textiles. She stated that now she has found employment in her chosen field, she wants to support the sponsor who wants to pursue employment options in tennis coaching and as a hitting partner.
20. The Tribunal finds that the parties have and continue to support each other financially, pool their financial resources, and share day-to-day expenses commensurate with being in a genuine de facto relationship, at their life-stage.

Nature of the household

21. Copies of joint tenancy agreements were provided from 2015 to 2020. As noted, the parties live in an apartment leased to them by the sponsor's brother. The applicant stated that at various times her younger brother has lived with them and shared the rent. Photos were provided of the parties at home with their cat.
22. Copies of mail were provided with dates from 2016 to 2019, addressed to both of the parties at their jointly leased apartment.
23. The parties do not have children. They stated at hearing that despite family pressure and expectation, they are at present focussed on establishing themselves in their chosen careers and enjoying life as a couple. Photos were provided of the parties with the sponsor's brother's children. They described how they are close to these children, and often care for them on weekends.
24. The parties provided written statements describing how they share the housework, shopping and cooking.
25. The Tribunal finds that the parties have established a joint household.

Social aspects of the relationship

26. A large number of photographs were provided of the parties together and with family members and friends, from the time of the sponsor's high school graduation to this year in Brisbane. The photos show them travelling with family to Bali for a holiday in 2014; travelling together and with family in Australia; participating in the weddings of family and friends; at family meals; and out with friends.
27. A statutory declaration signed on 18 February 2016 was provided at the time of application by a friend of the parties of ten years, who declares that she has observed the parties together over regular brunches, holiday outings and birthday celebrations and knows them to be a committed couple. A statutory declaration signed on 13 February 2016 was provided by a friend of the sponsor, who declares that he observed the applicant attend and support the sponsor at his sporting events and knows the parties socially as a committed couple who live together. Both of the statutory declarations provided detailed observations reflecting their familiarity with the parties.
28. The Tribunal finds that the parties plan and undertake joint social activities as a de facto couple; and that the parties represent themselves and are recognised by family, friends and acquaintances as a couple in a committed relationship.

Nature of persons' commitment to each other

29. Copies of emails were provided sent by the parties to each other in 2003, in which they declare their feelings and recognition that they are 'stuck with each other'. Written statements were provided to the Tribunal by both of the parties, each describing the development of the relationship from friendship to long-term commitment. The statements include examples of times including the death of a family member, the applicant's move to Australia for tertiary studies, and career choices and changes, when the parties have provided emotional support to each other. Copies of recent text messages were provided, showing the parties communicating, with intimacy, about household and family issues.

30. The photographs provided show, as noted, that the parties were friends at school and that they have been in a relationship since 2003. The photos show a couple growing into adulthood, comfortable and happy in each other's company.
31. The Tribunal finds that the parties are in a relationship of over 15 years' duration; that they have lived together for nine years; and that they are each other's main source of companionship and emotional support. The Tribunal finds that the parties see the relationship as long-term.
32. Having considered the circumstances of the parties and having considered and made findings on the above matters, the Tribunal finds that the parties do have a mutual commitment to shared life to the exclusion of others; that they are in a genuine and continuing relationship; and that they do live together or not separately and apart on a permanent basis.
33. The parties are not related by family.
34. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made and the time of this decision.
35. Therefore the applicant meets cl.820.211(2)(a) and cl.820.221.
36. The parties are over 18 years of age and the applicant is sponsored by her de facto partner. Therefore the applicant meets cl.820.211(2)(c). The applicant was the holder of a substantive visa at the time of application. Therefore the applicant meets cl.820.211(2)(d).

Are the additional criteria for a de facto relationship met?

37. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
38. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
39. Evidence was provided in the form of a Queensland Relationship Registration Certificate that the parties registered their relationship with the Qld Registry of Births, Deaths and Marriages on 8 February 2016. The Tribunal is satisfied that the parties have registered their relationship under the Queensland Relationship Act 2001.
40. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
41. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

42. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations
 - r.2.03A

Adrienne Millbank
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).